Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM OF ST. JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.

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Appellee, Saint Joseph College at Emmitsburg, Maryland, Inc., pursuant to Rule 16 of the Supreme Court of the United States, moves the Court to affirm the judgment of the United States District Court of three judges for the District of

Maryland, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the District Court of three judges, Bryan J., dissenting, was issued October 16, 1974. It is set forth in the Appendix of Appellants' Jurisdictional Statement.[1] Findings of fact were filed November 30, 1973; amended findings of fact were filed January 18, 1973 and were included by the court below as an appendix to its opinion. The findings of fact of the District Court are set forth in the Appendix at A. 35. The opinion and findings have not been reported.

JURISDICTION

Jurisdiction of the court below is grounded upon Title 28, United States Code, Section 1331. A District Court of three judges was convened pursuant to Title 28, United States Code, Section 2282 and 2284.

Judgment against appellants was entered on October 21, 1974 in the United States District Court for the District of Maryland and notice of appeal was filed in that court by appellants on October 25, 1974.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

STATUTES INVOLVED

The Maryland law involved is Chapter 626, Acts of 1971 (entitled "Aid to Non-Public Institutions of Higher Education"); as amended by Chapters 483 and 534, Acts of 1972

[1] All references hereinafter to the "Appendix" shall refer to the Appendix of Appellants' Jurisdictional Statement. Pages of that Appendix are cited as "A. 1", "A. 2", etc.

and Chapter 716, Acts of 1973. The statute, as amended, is codified in Article 77A, §§65-70, Annotated Code of Maryland (1974 Cumulative Supplement) (A. 52-55).

QUESTIONS PRESENTED

I. Should this Court affirm the judgment below where the Maryland District Court of three judges has correctly applied the constitutional principles and specific criteria established by this Court to determine whether public aid to church-related colleges violates the Establishment Clause?

II. Was the Maryland District Court of three judges correct in holding that the Maryland statute does not have the primary effect of advancing religion?

III. Was the Maryland District Court of three judges correct in holding that the Maryland aid program does not foster excessive government entanglement with religion?

STATEMENT OF THE CASE

This suit was brought on March 27, 1972 by the American Civil Liberties Union of Maryland, Protestants and Other Americans United for Separation of Church and State and the Appellants, four Maryland citizens and taxpayers. Plaintiffs' complaint alleged that the Maryland statute violated the Establishment Clause and the Free Exercise Clause of the First Amendment. Plaintiffs prayed that the statute be declared unconstitutional on its face and as applied; that the Appellee, Board of Public Works of Maryland (defendant below) be enjoined from paying aid to the Appellee colleges (defendants below); that the Appellee colleges be required to return the funds received with interest earned; and that judgment for costs in favor of Appellants be entered.

Defendants to the suit are the Appellees herein: The Board of Public Works of the State of Maryland and its three individual members; and five private church-related colleges.

The Maryland statute was enacted in 1971 and amended in 1972 and 1973. Chapter 626, Acts of 1971, effective July 1, 1971 authorized the Board of Public Works to award to private institutions meeting the criteria set forth, two hundred dollars for each Associate degree granted and five hundred dollars for each Bachelor's degree granted by the college. The Act provided that the college could not be an institution awarding only seminarian and theological degrees. The Act contained no restrictions as to the use of the funds granted.

The 1971 Act was amended by Chapter 534, Acts of 1972, effective July 1, 1972. The Act imposed the restriction that no funds received could be used for sectarian purposes.

The Act was further amended in 1973 by Chapter 716, Acts of 1973, effective July 1, 1973. The Act provided for awards of five hundred dollars for advanced degrees, provided that sufficient funds were appropriated in excess of sums necessary for awards for undergraduate degrees. The restrictions as to use were effective as to the graduate awards.

The court below dismissed the organizational Plaintiffs for lack of standing (A. 2, n. 1), and dismissed the challenge based upon the Free Exercise Clause (A. 3, n. 2).

On the merits the court below held that the original version of the statute, Chapter 626, Acts of 1971, violated the Establishment Clause because it contained no restrictions prohibiting the sectarian use of the funds (A. 23). The court below denied Appellants' prayer that funds distributed under the Act be returned to the State because: 1) Suit was filed nine months after enactment of the statute and five months after payments were made; 2) The Appellees spent the funds in reliance upon the constitutionality of the Act; 3) Both *Lemon* and *Tilton* were decided after expenditure of the funds; 4) The defects in the Act were corrected in 1972 and the constitutional values to be protected by the

Establishment Clause would not be furthered by a refund (A. 24-25).

The court below held that the statute, as amended, was constitutional, and the court denied Appellants' prayers for relief. The Judgment was filed October 21, 1974 (A. 57-58).

The court below found the five Appellee colleges conformed closely to the defendant colleges in *Tilton v. Richardson*, 403 U.S. 686 (1971) (A. 10-11), and that the Appellee colleges are not so pervasively sectarian that the aid would have the primary effect of advancing religion (A. 11). The specific facts found as to Appellee Saint Joseph College are set forth in the Argument at pages 13-15 herein.

The court below found that the administering body (The Maryland Council of Higher Education) had established procedures sufficient to safeguard the funds against use for sectarian purposes. The Council requires verification by the college, before and after use of the funds, that diversion of the funds for religious purposes will not and has not occurred (A. 12). The colleges' verification of usage can be audited, if necessary, to confirm that the verified use in fact occurred (A. 12).

The court below found that the usage verification did not cause excessive entanglement of government with religion (A. 17), citing the nature of the fund accounting which is used by Appellee colleges to comply with federal grants (A. 48).

The court found that the administering body should exclude aid for the theology and religion departments of the Appellee colleges to avoid the possibility of misuse of the aid (A. 12-13). The court found "no indication that religious indoctrination was a goal of these schools" (A. 13), but that the funds should be so restricted absent "a clear indication that theology was taught as an academic discipline" (A. 13).

At the time of trial, no funds had been disbursed under the 1972 amendment which prohibited use of funds for sectarian purposes. The funds were held in escrow (A. 37, n. 2). Following the entry of judgment, Appellants moved for an injunction against payment of the escrowed funds pending this appeal. The motion was denied by the three-judge court below. Thereafter, application for injunction pending appeal was submitted to this court and denied on November 25, 1974.

ARGUMENT

I.

THIS COURT HAS ESTABLISHED CONSTITUTIONAL PRINCIPLES AND SPECIFIC CRITERIA TO DETERMINE WHETHER PUBLIC AID TO CHURCH-RELATED COLLEGES VIOLATES THE ESTABLISHMENT CLAUSE, AND THE MARYLAND DISTRICT COURT OF THREE JUDGES HAS CORRECTLY APPLIED THOSE PRINCIPLES AND CRITERIA; THEREFORE, THIS COURT SHOULD AFFIRM THE JUDGMENT BELOW ON THE GROUND THAT NO SUBSTANTIAL QUESTION IS PRESENTED WHICH REQUIRES FURTHER ARGUMENT.

This Court has established controlling constitutional principles and specific criteria to determine whether programs providing public funds to church-related institutions violate the Establishment Clause.

> "Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 (1973).

The principles and criteria have been established in six decisions since 1971. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

A. The Constitutional Principles and Specific Criteria Governing this Case are Established and not in Dispute.

In each case, this Court has applied the same three-pronged test:

> "As we reaffirm today in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, the principles which govern our consideraiton of challenges to statutes as violative of the Establishment Clause are three.
>
> 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . ; finally, the statute must not foster "an excessive entanglement with religion." ' *Lemon v. Kurtzman, supra*, 403 U.S. 612-613." *Hunt v. McNair, supra*, 413 U.S. 734, 741.

The court below specifically applied this test to the Maryland statute. Appellants do not question the conclusion of the court below that "the statute was enacted with a secular purpose" (A. 9). Appellants do question the holdings of the court below "that the statute has not had the primary effect of advancing or inhibiting religion" (A. 9); and that the "relationship between church and state which results from this aid program is not entangling" (A. 17).

B. The Three-Judge Court Below Correctly Determined from the Facts that the Maryland Statute and the Appellee Colleges Meet the Established Criteria.

This Court has established that a pivotal issue of fact in applying the "primary effect" and "entanglement" standards, is whether the recipient institution is pervasively sectarian.

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institu-

tion in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt v. McNair, supra,* 413 U.S. 734, 743.

"The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." *Hunt v. McNair, supra,* 413 U.S. 734, 746.

"Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveiilance is diminished and the resulting entanglements between government and religion lessened." *Tilton v. Richardson,* 403 U.S. 672, 687.

In *Tilton* and *Hunt,* this Court found that the facts supported its observation that "college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." *Tilton v. Richardson, supra,* 403 U.S. 672, 686.

> "On the record in this case, there is no basis to conclude that the College's operations are oriented significantly towards secetarian rather than secular education." *Hunt v. McNair, supra,* 413 U.S. 734, 744.
>
> "In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." *Tilton v. Richardson, supra,* 403 U.S. 672, 687.

The court below found that the Appellee colleges "conform closely to the colleges approved in *Tilton v. Richardson*"

(A. 10-11). Appellants continue to maintain, in their jurisdictional statement (p. 22) that four of the Appellee colleges are "sectarian."

A second pivotal issue of fact established by this Court in applying the "primary effect" and "entanglement" standards is whether the character of the aid provided is "secular" and "nonideological." *Tilton v. Richardson, supra,* 413 U.S. 672, 679; *Committee for Public Education and Religious Liberty v. Nyquist, supra,* 413 U.S. 756, 780.

In *Tilton, supra,* this Court considered Title I of the Higher Education Facilities Act of 1963. 77 Stat. 364, as amended, 20 U.S.C. §§ 711-721 (1964 ed. and Supp. V), which "provides construction grants for buildings and facilities used exclusively for secular educational purposes." 403 U.S. 672, 674-75. This Court cited the restrictions set forth at § 751 (a) (2) of the statute which expressly excluded:

> "Any facility used or to be used for sectarian instruction or as a place for religious worship, or * * * any facility which * * * is used or to be used primary in connection with any part of the program of a school or department of divinity * * *." *Tilton v. Richardson, supra,* 403 U.S 672, 675.

In *Hunt v. McNair, supra,* this Court considered a South Carolina statute with the following restrictions:

> "Any facility used or to be used for secetarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." *Hunt v. McNair,* 413 U.S. 734, 736-37.

The Maryland statute has the following restricting language:

> "None of the monies payable under this subtitle shall be utilized by the institution for sectarian purposes." Maryland Annotated Code, Article 77A, § 68A (A. 54).

"In order to qualify for state aid apportionments pursuant to this subtitle, any institution of higher education must meet each of the following requirements: . . . (d). The institution cannot be one awarding only seminarian or theological degrees; . . ." Maryland Annotated Code, Article 77A, § 66 (A. 53).

In *Tilton v. Richardson, supra,* and *Hunt v. McNair, supra,* use of the aid was forbidden for "sectarian instruction" or "religious worship" and "in connection with any part of the program of a school or department of divinity." The Maryland statute forbids use of the aid for "sectarian purposes" and declares ineligible colleges "awarding only seminarian or theological degrees." The court below construed the restrictions to forbid aid to theology departments, a restriction similar to the statutory restrictions considered in *Tilton* and *Hunt.*

C. This Court's Established Principles and Criteria Do Not Require that Aid to Church-Related Colleges Which is Restricted to Non-Sectarian Purposes Must Be Further Limited to Particular Secular Purposes.

Despite the statutory restriction, Appellants, in their Jurisdictional Statement, characterize the Maryland aid as "undefined" (p. 7), "virtually unlimited" (p. 8) and "unrestricted" (p. 17). Appellants apparently contend that there is a constitutional requirement that the aid must not only be restricted as to forbid use for sectarian purposes, but the use of the aid for non-sectarian purposes must be further restricted.

The court below considered this question and concluded:

"The Maryland aid program is characterized by direct non-categorical grants restricted by a prohibition on use for sectarian purposes. Leaving aside the question of

the efficacy of this prohibition, the differences between this program and the *Tilton* program are more apparent than real. In *Tilton* direct grants were available for the construction of virtually any type of building, subject to similar prohibitions against sectarian usage. Thus, the *Tilton* funds were used to construct two libraries, a music, drama and arts building, a science building and a language laboratory. Every non-sectarian program in the defendant colleges could be benefited by the federal aid program, and the difference between the *Tilton* aid program and the Maryland aid program thus resolves itself into a difference between construction grants and non-categorical grants. Clearly the latter distinction does not rise to constitutional dimensions" (A. 17).

It is significant that this Court in *Tilton v. Richardson, supra,* in expressly considering the twenty-year duration of the restrictions, left the use of the buildings virtually unrestricted for the entire useful life of the building, except for the restriction against religious worship and sectarian instruction.

"Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period." 403 U.S. 672, 683.

"We conclude that the Act does not violate the Religious Clauses of the First Amendment except that of § 754 (b) (2) providing a 20-year limitation on the religious use restrictions contained in § 751 (a) (2)." 403 U.S. 672, 691.

In *Hunt v. McNair, supra,* the aid was in the nature of revenue bonds for "projects", and this Court found that the religious restrictions in the statute, as set forth above, were sufficient.

"The scope of the Authority's power to assist institutions of higher education extends only to 'projects' and the Act specifically states that a project 'shall not in-

clude' any buildings or facilities used for religious purposes. . . . In addition, as we have indicated, every lease agreement must contain a clause forbidding religious use and another allowing inspection to enforce the agreement. For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion." *Hunt v. McNair, supra,* 413 U.S. 734, 744-45.

This Court has required that aid to church-related colleges be restricted to secular purposes. It has not required that the secular purposes be categorized or limited in any other manner. The fact that Maryland aid is "non-categorical" is a distinction without a difference.

The court below applied the constitutional principles and criteria established by this Court to determine whether public aid to church-related institutions violates the Establishment Clause. The court below has determined that none of the colleges are pervasively sectarian and that the state aid is nonideological. This Court has not required secular aid to be categorized for particular secular purposes. This case does not present a substantial question.

II.

THE MARYLAND DISTRICT COURT OF THREE JUDGES IS CORRECT IN HOLDING THAT THE MARYLAND STATUTE DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

In order to sustain Appellants' contention that public aid to the Appellee colleges has the primary effect of advancing religion, Appellants must prove that "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." *Tilton v. Richardson, supra,* 403 U.S. 672, 680.

A. St. Joseph College Has as Its Primary Purpose to Provide a Secular Education and Religion Does Not Permeate that Secular Education to the Extent that the Religious and Secular Educational Functions Are Inseparable.

The conclusion of the court below, that St. Joseph College, as well as the other Appellee colleges, closely parallels the colleges in *Tilton*, is sustained by the record. The following comparison specifically illustrates the parallels.

1. St. Joseph Colege is "characterized by an atmosphere of academic freedom rather than religious indoctrination" (A. 42). See *Tilton v. Richardson, supra,* 403 U.S. 672, 681.

2. Courses at St. Joseph College are taught "according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards" (A. 40). See *Tilton v. Richardson, supra,* 403 U.S. 672, 681.

3. St. Joseph College "subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, and . . . obviously abides by it" (A. 39). See *Tilton v. Richardson, supra,* 403 U.S. 672, 681-82. The teachers are subject to "no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials" (A. 38).

4. At St. Joseph College there are no "quotas for membership on the governing board based on religion or membership in a religious order" (A. 43). The College does not "receive aid from or make reports to an institutional church" (A. 43). In *Tilton v. Richardson, supra,* the colleges were governed by "Catholic religious organizations." 403 U.S. 672, 686.

5. At St. Joseph College "the great majority of students . . . are Catholics" (A. 44), but "student bodies are

chosen without regard to religion" (A. 44). See *Tilton v. Richardson, supra*, 403 U.S. 672, 686.

6. At St. Joseph College "the main criteria for hiring is academic quality" and "hiring decisions are effectively low-level and participatory" (A. 41).

7. St. Joseph College does not "require attendance at any religious exercise" (A. 44). See *Tilton v. Richardson, supra*, 403 U.S. 672, 686.

8. Although St. Joseph College is "interested in encouraging spiritual interests," this encouragement does not "go beyond providing the opportunities or occasions for religious experience" (A. 45), and "no aspect of the student conduct code . . . has any religious content" (A. 44).

9. Although some classes at St. Joseph College begin with a prayer, "those classes which do start with prayer often do not utilize what would be called a traditional form of prayer, and students join in or not at their option" (A. 39). "[T]here is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom" (A. 39). The Court below found that "a Maryland education department group which monitered the teachers education program at the College saw no evidence of religion entering into any elements of that program" (A. 40). This Court in *Tilton v. Richardson, supra*, found no evidence of religion "seeping" into secular programs. 403 U.S. 672, 681.

10. St. Joseph College does "not offer majors in religion or theology" (A. 45), but "certain of these courses are required" (A. 46). The court below found "no indication that religious indoctrination was a goal of [St. Joseph College]" (A. 13), but that religious courses "afford a congenial means of furthering the secondary objective of fostering religious experience" (A. 46). In *Tilton v. Richardson, supra*, this

Court found that religious courses were required and that they were taught as academic disciplines. 403 U.S. 672, 686.

Appellants rely heavily upon the finding of the court below that a secondary objective of each Appellee college is to "encourage spiritual development of the students, . . ." (A. 45). This finding was quite specific. The court found, "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience" (A. 45).

In the face of these facts as found by the court below, Appellants still urge this Court to find a substantial question based on their contention that the Appellees are "sectarian." Clearly St. Joseph College is not "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . ." *Hunt v. McNair, supra*, 413 U.S. 734, 743.

Appellants further contend that "since there is a practice of prayer in at least some classrooms, the State is financing religious worship . . . . Therefore, the Maryland program is unconstitutional" (Jurisdictional Statement, pp. 19-20). This contention is not supported by precedent. The coercive elements cited by this Court in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 223 (1963), are not present in this case.

In the instant case, there is no contention that the State requires prayer; the Appellee institutions do not require prayers; the prayers are not part of the curriculum; the students are not required by law to attend; the teachers are not required to supervise the prayer or to say the prayer. There is no precedent of this Court holding that governmental aid to a private institution violates the Establishment Clause because the institution permits prayers to be said by those associated with it.

B. At St. Joseph College There Are No Religious Restrictions on Faculty Appointments and Student Admissions.

Appellants contend that Appellee colleges "impose religious restrictions on faculty appointments and perpetuate de facto religious restrictions on student admissions" (Jurisdictional Statement, p. 20). There is absolutely no evidentiary basis to support either of these contentions with respect to St. Joseph College; the express testimony and exhibits were precisely to the contrary, and the Court below so found:

> "However, thorough analysis of the student admission and recruiting criteria of each defendant demonstrates that the student bodies are chosen without regard to religion" (A. 44).
>
> "At . . . St. Joseph College, members of religious orders of women receive less than full faculty salary, although budgetary considerations lead the colleges to favor a member of an order, the main criteria for hiring is academic quality" (A. 41).
>
> ". . . the faculty members of each defendant, many of whom testified, impress the Court as professionals who value academic freedom and see no place for religious bias in liberal arts education" (A. 41).

The contention of Appellants that there are restrictions on faculty hiring and student admissions is without foundation in the evidence and the findings of the court below.

C. The Maryland Statute Prohibits Aid for Sectarian Purposes and the State has Established Procedures to Enforce the Restrictions.

Appellants maintain "there is no effort whatsoever to ascertain that the Maryland aid, when ultimately received by the church-related appellees, is confined to secular purposes. . . ." (Jurisdictional Statement, p. 17). The court below

described the administrative mechanisms which Appellants maintain do not exist:

> "The second level of screening is a determination of whether state funds have been improperly used. After the program was in operation and one year's funds awarded, the statute was amended to prohibit the use of state funds for 'sectarian purposes.' Chap. 534, 1972 Laws of Maryland, Art. 77A, § 68A, Annotated Code of Maryland (1969 Replacement Vol.). That statutory stricture is implemented through requirements of verification by the college president before receipt that funds will not be improperly expended, and verification one year thereafter that funds have not been improperly used. The Council requires sufficient detail, through follow-up on the usage description which accompanies the second verification, to determine whether the expenditure was for sectarian use. (The pre-amendment funds awarded for degrees conferred during the 1970-1971 academic year were never subjected to this second level of screening.)
>
> The usage verification and the normal annual accounting which each college conducts obviate the need for post-audit analysis in every case. Such analysis is available when needed, however. State auditors could accomplish a post-audit analysis, using accepted accounting techniques, in one day or less" (A. 47-48).

Appellants contend: "Nor [at the time of trial] had the State made any effort to ascertain how funds already paid to the church-related appellees had been used." (Jurisdictional Statement, pp. 5-6). They overlook the fact that the only funds paid out at the time of trial were paid under the original act which did not contain any restrictions on sectarian use, and the funds awarded after the Act was amended in 1972 were still in escrow (A. 37, n. 2).

Appellants contend that the State's enforcement will be ineffective, citing the finding of the court below that the

available audit procedure is "non-judgmental." (Jurisdictional Statement, p. 18.) It is clear, however, that it is not the availability of the audit procedure which is the primary mechanism of enforcement. The audit procedure is just an additional mechanism which is "available when needed" as a "mechanical accounting of state grant expenditures." (A. 48).

The restrictions are enforced by requiring the college presidents to verify, before and after receipt and use of the funds that they will not be improperly used, and with "sufficient detail, through follow-up on the usage description . . . to determine whether the expenditure was for sectarian use" (A. 48).

Despite the conjecture and hypothetical problems raised by Appellants, the court below was satisfied that the State's procedures, and the experience of the Appellee institutions with federal program requirements, afford protection that the aid will be used for secular purposes (A. 48).

After extensive testimony, the court below concluded that the State was able and prepared to enforce the restriction:

> "The procedural posture of this case has prevented the development of follow-up procedures to ensure that no state funds are converted to religious uses in later years. However, unlike the 20-year restriction held unconstitutional in *Tilton*, the prohibition on sectarian use in the statute is absolute, and the Council seems aware of its responsibilities in this matter. The Court is satisfied that adequate, non-entangling follow-up procedures will be developed. *See* Findings of Fact" (A. 18).

Because religion does not permeate the secular educational programs of Appellee colleges, the established procedures of the Maryland administering body effectively prohibit the use of funds for sectarian purposes as required by the Maryland Act. The Maryland District Court of three judges is correct

in holding that the statute does not have the primary effect of advancing religion, and therefore, this case does not present a substantial question.

III.

THE MARYLAND DISTRICT COURT OF THREE JUDGES IS CORRECT IN HOLDING THAT THE MARYLAND AID PROGRAM DOES NOT FOSTER EXCESSIVE GOVERNMENTAL ENTANGLEMENT WITH RELIGION.

The court below found that the "relationship between church and state which results from this aid program is not entangling" (A. 17). The court below considered the three mitigating factors noted by this Court in *Tilton:*

> "In evaluating administrative entanglement, the Court must examine three factors: The 'character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority'. *Lemon v. Kurtzman, supra,* at 615" (A. 14).

The court below concluded that 1) "The aid in this program is restricted to the secular aspects of the institutions." (A. 19); 2) "It has been found that religious indoctrination is not a purpose of these institutions." (A. 19); 3) "the continuing nature of the program is not constitutionally fatal" (A. 20).

A. This Court has Established that the Risk of Entanglement Between Government and Religion is Lessened When Religion Does Not Permeate the Area of Secular Education of Church-Related Colleges.

The factual basis for this Court's holding in *Lemon v. Kurtzman, supra,* that the Pennsylvania aid program fostered excessive entanglement between government and religion,

was the finding that religion and indoctrination were interwoven through the fabric of the entire educational program:

> "The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula. What is palpably a sectarian course can be marked for deletion. But the problem only starts there. Sectarian instruction, which, of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught*? We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 634-35 (concurring opinion of Mr. Justice Douglas).
>
> "It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 635 (concurring opinion of Mr. Justice Douglas).
>
> "In the present cases we deal with the totality of instruction destined to be sectarian, at least in part, if the religious character of the school is to be maintained. A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 636-37 (concurring opinion of Mr. Justice Douglas).

In *Lemon*, this Court found that policing the restrictions upon the aid would require an entangling relationship:

> "I would think that policing these grants to detect sectarian instruction would be insufferable to religious partisans and would breed division and dissension between church and state." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 636 (concurring opinion of Mr. Justice Douglas).

This Court in *Lemon* also found direct and absolute control of the church over the teachers: "This problem looms large where the church controls the hiring and firing of teachers." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 636 (concurring opinion of Mr. Justice Douglas).

It is clear that the basic distinction between *Tilton* and *Lemon* is that the secular educational function of the colleges in *Tilton* was not so permeated by religious indoctrination that an entangling relationship resulted from enforcement of the restrictions:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglement between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws." *Tilton v. Richardson, supra*, 403 U.S. 672, 687.

Again in *Hunt v. McNair, supra*, this Court stated that the entanglement of government and religion was caused by the inseparability of religion and the secular educational program:

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." 413 U.S. 734, 746.

B. The Court Below Found that Religion Did Not Permeate the Secular Educational Programs of the Appellee Institutions, and the State Could Ensure Use of the Aid for Those Secular Programs Without Establishing an Entangling Relationship.

In administration, the Maryland aid program initially eliminates from eligibility colleges which primarily award theological degrees (A. 18). As to the eligible colleges, the president must verify before and after receipt of the funds that they will be used for purposes permitted by the statute (A. 48). The State administering body "requires sufficient detail, through follow-up on the usage description which accompanied the second verification, to determine whether the expenditure was for sectarian use" (A. 48).

This two-step "before and after" verification procedure is essentially the type of procedure used to ensure proper use of funds received under the Higher Education Facilities Act of 1963. (See the lower court decision in *Tilton*, i.e. *Tilton v. Finch*, 312 F. Supp. 1191, at 1202 (D. Conn. 1970).

Once the use made of the aid is identified by the college and approved by the administering body, an auditing procedure is available to verify that the funds are used for the purposes stated. The court below found that the technique of fund accounting to comply with grant restrictions is in use at the colleges to comply with federal grant programs and that any aduit required by the Maryland program would be "quick and non-judgmental" (A. 48).

Appellants contend that a non-judgmental audit is of no effect. Obviously, the auditor "judges" whether the funds are spent for the purposes stated. The effective judgment is made, however, by the administering body in acting upon the usage verification. Since religion does not permeate the

secular education of the Appellee colleges, the judgments made do not require the sorting out of religious from secular functions which this Court has held to be entangling.

Appellants object that the Maryland aid could be used by the colleges to pay teachers' salaries, and that "teachers are not necessarily religiously neutral." *Tilton v. Richardson*, *supra*, 403 U.S. 672, 687-88. Aid for such purposes would not be a subsidy to teachers, but would be aid to the secular educational program of the college, which the court below has found to be implemented out without any religious indoctrination or inculcation of religious values by the teachers (A. 14). Unlike the parochial schools in *Lemon*, the teachers at Appellee colleges are not hired directly by the church, and they teach in accordance with academic, not religious, requirements (A. 40-42).

It is clear that this Court in *Tilton* permitted a "continuing relationship" between the government and colleges. The Court, in fact, required the inspection of the facility to continue beyond the twenty-year period prescribed by the statute. 403 U.S. at 689. This Court distinguished *Tilton* from *Lemon* because enforcement of the Higher Education Facilities Act did not require a continuous surveillance of the institution:

> "Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is one-time, single-purpose construction grant." *Tilton v. Richardson*, *supra*, 403 U.S. 672, 688.

A continuing relationship between the State of Maryland and Appellee colleges does not, in itself, foster excessive entanglement between government and religion. The entangling

relationship found by this Court in *Lemon* was the continuing governmental surveillance necessary to detect and remove from parish school programs the methods of religious inculcation which permeated those sectarian institutions. In this case, the court below found that no such detection and removal is necessary, because the secular educational programs of the colleges are not permeated by religion, and that the State can ensure use of the aid for those secular programs without establishing an entangling relationship. The Maryland District Court of three judges correctly held that the Maryland aid program does not foster excessive governmental entanglement with religion, and therefore this case does not present a substantial question.

CONCLUSION

The court below correctly applied the constitutional principles and specific criteria established by this Court and determined that the Maryland aid program does not have the primary effect of advancing religion and does not foster excessive entanglement between government and religion. Although Appellants insist that the court below erred in its factual findings that the secular educational programs of Appellee institutions are not permeated by religion, and that the Maryland statute does, in fact, restrict the aid from use for sectarian purposes, such insistence by Appellants does not raise a substantial question warranting further argument before this Court, and the judgment of the Maryland District Court of three judges should be affirmed.

Respectfully submitted,

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